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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-77

STATE OF OREGON,

Petitioner,

v.

SHAWN ROBERT McGREW,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Shawn Robert McGrew, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the opinion of the Oregon Court of Appeals in this case. That opinion is reported at 38 Or App 493, 580 P2d 755.

QUESTION PRESENTED

Was the decision of the Oregon Court of Appeals -- that petitioner had failed to meet its burden of demonstrating that

respondent's waiver of his right to remain silent was voluntary -- incorrect and unreasonable where that court found the following circumstances surrounding the purported waiver:

First, that respondent was "17 years old with the mental acuity of a 12 or 14 year old child [and] he had alcohol problems severe enough to require hospitalization on at least two occasions;"

Second, that the waiver occured after respondent had been taken into custody at the police station as a murder suspect;

Third, that the waiver followed an "offer [to respondent] of assistance [for his alcohol problem], conditioned upon the defendant confessing to the crime, [and which] was obviously designed to induce defendant to give up the right to remain silent;" and

Fourth, that the waiver followed an additional statement by the police detective "the obvious intent of [which] was to induce defendant to give up the right to remain silent."?

SUPPLEMENTAL STATEMENT OF FACTS

On June 27, 1977, the body of a murdered woman was found on the grounds of a synagogue in Portland (Tr 64-65). Subsequently Mike Nielsen, a friend of defendant, heard that defendant believed he committed the murder (Tr 180). Nielsen contacted defendant and was told by defendant that he wished to turn himself in (Tr 161). Nielsen accompanied defendant to the police station and, enroute, told defendant that he did not have to say anything when they got to the police station and that defendant could wait until he talked to an attorney (Tr 160).

When they arrived at the police station, Nielsen asked the receptionist if she was familiar with the murder and said defendant told him that he was the one who did it (Tr 12). The defendant said nothing (Tr 12). The receptionist testified she thought the defendant was under the influence or drunk (Tr 18-19).

Approximately five minutes later an officer entered and was told by Nielsen that defendant believed himself to be

guilty of murder (Tr 16, 30). Defendant gave an affirmative response when the officer asked him if that were true (Tr 30). The officer then took defendant and Nielsen to an interview room where defendant was read his Miranda rights (Tr 30-31). Defendant indicated he understood these rights and answered questions regarding his name, address and date of birth (Tr 31-32). Defendant was then informed he was a suspect, was handcuffed and taken to the Detective Bureau in the same building (Tr 35-36).

Defendant was then placed in a small custody room where the handcuffs were removed (Tr 36, 40). Detective Kagey, who had been assigned to the homicide case, entered and Nielsen told Kagey that he had advised defendant not to make any statements until defendant had an opportunity to speak with counsel (Tr 66-67). Defendant was seated next to Nielsen but remained silent (Tr 75). Kagey asked defendant his name, age and address and then directed his conversation to Nielsen (Tr 75). Kagey asked him to step into the hallway, where outside defendant's

presence Kagey told Nielsen that Defendant would have to convince him that defendant was involved in the murder before he could arrest defendant (Tr 75). They reentered the room, and Nielsen again advised defendant not to speak without an attorney (Tr 95).

Kagey then took defendant and Nielsen to a larger room to wait for Kagey's partner, Detective Blodgett (Tr 77-78). Defendant told Kagey that he was an alocholic, had been hospitalized for treatment and desired more help (Tr 78, 92, 94, 509). Kagey then told defendant that "if in fact he was responsible for this [murder] and if he did commit this act that he should become involved in the [court] system [because] [t]hat's the only way I could get him any help" (Tr 94).

Kagey and Nielsen again went out into the hallway away from defendant, and Nielsen again requested an attorney for defendant (Tr 93). This time Kagey told Nielsen that they could get an attorney but "if you [Nielsen] are personally convinced that he committed this crime and if you are sure he's responsible for this

and an attorney tells Shawn not to say a word, then Shawn goes out the door; we don't have a case against Shawn McGrew" (Tr 93). Nielsen then requested to speak to defendant alone, and Kagey agreed (Tr 96). Nielsen told defendant that Kagey had told him "if he thought he did something wrong that he should just come clean with it" (Tr 174). Nielsen then informed Kagey that defendant had decided to give a statement to the officers (Tr 97).

About this time Detective Blodgett arrived with a tape recorder (Tr 80, 110). Nielsen was told to leave (Tr 183). The officers then advised defendant of his Miranda rights and obtained a signed waiver (Tr 81, 111).

The trial court found that, from the point the handcuffs were put on him, defendant was in custody (Tr 193).

The Court of Appeals summarized defendant's condition at that time as follows:

> "Defendant was 17 years old with the mental acuity of a 12 or 14 year old child. He had alcohol problems severe enough to require hospitalization on at least two occasions. He was obviously relying on his friend

> Nielsen for guidance and was separated from Nielsen at the time the waiver card was signed and the incriminating statements made" 38 Or App 493, 499.

The Court of Appeals further found that:

> "Prior to the waiver, the detective, in response to defendant's request for help with his alcohol problem, told defendant unless he told the police about his involvement in the murder they could not get him involved in the court system where he could get help. This offer of assistance, conditioned upon the defendant confessing to the crime, was obviously designed to induce defendant to give up the right to remain silent.
>
> "In addition, again prior to obtaining the waiver, the detective told Nielsen 'if you [Nielsen] are personally convinced that he committed this crime and if you are sure that he's responsible for this and an attorney tells Shawn not to say a word, then Shawn goes out the door * * *.' This message was communicated to defendant by Nielsen, who told defendant the detective had said "if he thought he did something wrong that he should just come clean with it." Although the statement was made to Nielsen and not the defendant, the police were aware of defendant's reliance on Nielsen and that

> the message would be communicated to the defendant. Again, the obvious intent of the message was to induce defendant to give up the right to remain silent" 38 Or App 493, 499, 590 P2d 755, 758.

The Court of Appeals then concluded:

> "[T]he state has failed to demonstrate the waiver was voluntary and not merely a response to the detective's inducement." 38 Or App 493, 500, 590 P2d 755, 759.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The first Question Presented - the applicability of the requirements of Miranda v. Arizona, to this case - is not properly before this Court because petitioner never raised this question in the State courts and they were never, therefore, given the opportunity to consider and decide the question.

Petitioner's only argument to the Oregon Court of Appeals was as follows:

> "Respondent [State of Oregon] urges this court to adopt a general voluntariness standard with respect to waiver of a previously asserted right to remain silent and maintains that, under a voluntariness standard,

> defendant in this case waived his right to remain silent." Respondent's Brief at page 5.
>
> "If Mr. Nielsen's purported assertion of defendant's privilege was adequate, respondent maintains that defendant waived his right to counsel. . ." Respondent's Brief at page 9.

In its Petition For Review by the Oregon Supreme Court, petitioner stated that:

> "The issue in this case is whether defendant's waiver of his Miranda rights was voluntary." Petition For Review at page 8.

II.

The first Question Presented is not raised by the record.

Petitioner questions the applicability of the requirements of Miranda v. Arizona, where respondent "arriv[ed] at the police station, express[ing] an intent to confess to an unsolved murder." But there is no evidence in the record that defendant expressed such an intent. The record is to the contrary. The Oregon Court of Appeals noted that:

> "On route [to the police station], Nielsen told defendant that he did

not have to say anything when they got to the police station and that defendant could wait until he talked to an attorney." 38 Or App 493, 495.

Detective Kagey testified that:

"Mr. Nielsen advised me that he had brought Shawn to the police station and that he had advised Shawn to surrender himself in connection with this case and that he had advised Shawn not to make any statements until he had had a chance to talk to an attorney." (Tr 66-67)

Michael Nielsen testified that:

". . .There was some exchange about coming in and confessing. 'Did you you come in to tell us something or to confess?' Or something like that. I said that he didn't want to say anything until he saw an attorney." (Tr 166)

The trial court noted that:

"The defendant's position is he went there but was not going to talk to [the police] but told them he did a murder and was turning himself in." (Tr 187)

In the context of this record the first Question Presented in the petition could be resolved only by rendering an impermissible advisory opinion.

III

The decision of the Oregon Court of Appeals was in accord with settled law and was correct and reasonable in light of the particular facts found by the trial court and by the Court of Appeals.

The Court of Appeals held, simply, that petitioner had failed in its burden of proof. The burden applied by that Court is recited in the opinion of the Court as follows:

> "The prosecution has the burden of demonstrating a knowing, intelligent and voluntary waiver before any statement will be admissible." 38 Or App 493, 498.

This is a correct statement of the law, as settled by this Court in Miranda v. Arizona, 384 US 436, 475, 476, 86 SCt 1602, 16 LEd2d 694 (1966), where this Court noted:

> "This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, . . ."

The criteria to be considered by the court in determining whether or not the prosecution has met that burden was set

forth by this Court as follows in Johnson v. Zerbst, 304 US 458, 464, 58 SCt 1019, 82 LEd 1461 (1938):

> "The determination. . .must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

It is clear from the opinion of the Oregon Court of Appeals that that Court did consider these criteria:

> "The issue is the voluntariness of the waiver at the time it was given. The events preceeding the waiver reflect on voluntariness as does the character, personality and condition of the defendant." 38 Or App 493, 499.

Petitioner's real argument is with the facts as found by the trial court and by the Court of Appeals. Petitioner argues that the finding of the Court of Appeals that "defendant was 17 years old with the mental acuity of a 12 or 14 year old child," is "inaccurate and highly misleading;" that the "Court of Appeals plainly erred in stating as a fact that the police were aware" that a message found by that Court to have obviously been intended to induce respondent to give up his right to remain silent would be communicated to the

respondent; that the finding of the Court of Appeals that "the obvious intent of the message [from Detective Kagey to Nielsen] was to induce defendant to give up the right to remain silent," is "curious;" and that the finding of the Court of Appeals that a offer of medical assistance, conditioned upon a confession, was therefore designed to induce defendant to give up his right to remain silent, "is surely not tenable. The statement is a simple truism. . ."

In essence, petitioner asks this Court to make another review of the lengthy trial record. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 US 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below should be treated with and should be entitled to great weight.

In the present case, petitioner raises only questions turning entirely upon the particular facts of this case. Certiorari,

therefore, should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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